LANDLORD EXPOSED TO LIABILITY FOR INJURIES INCURRED BY TRESPASSER

Gould v. DeBeve
330 F.2d 826 (D.C. Cir. 1964)

Plaintiff, a two and one-half year-old boy, recovered 2,500 dollars in an action for damages for injuries sustained when he fell from a third floor window of an apartment in a building owned by defendant.[1] The apartment was leased to one Mrs. Dodd with an agreement restricting permanent occupancy to the Dodd family. Unknown to defendant, Mrs. Dodd had permitted the boy and his mother, Mrs. DeBeve, to share the apartment while paying half the rent.[2] The trial judge held that the DeBeves were trespassers by reason of the restricted occupancy clause; therefore, they were required to prove that the defendant "was guilty of wilful or wanton misconduct which proximately caused the injuries to the child" in order to recover.[3] Although the United States Court of Appeals assumed that the boy was a trespasser, it affirmed the verdict and judgment in his favor with Judge Miller dissenting.[4] The two questions relevant to this decision are whether the court followed established doctrine in holding the landlord liable for personal injuries occurring as a result of his failure to repair the leased premises, and if not, what were the policy considerations affecting this decision.

The court spent little time discussing the issue of when a landlord has a duty to repair, and more importantly, whether there was a duty to this particular plaintiff. Historically, a landlord had no duty to take affirmative action to repair premises; therefore, he could not be held liable even to his tenant for personal injuries resulting from defects which occurred after the execution of the lease.[5] Although this is still the rule today, some exceptions have been established. For example, the landlord may be required to repair the premises by statute or ordinance,[6] as in the District of Columbia.[7]

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[1] The window from which the boy fell was equipped with a screen which was warped and cracked and which did not fit securely into the grooves of the window frames. The defendant was notified of the condition of the screen several times but did not repair it. Although the boy recovered a judgment, the jury held against his mother for medical expenses in treating his injuries.

[2] Gould v. DeBeve, 330 F.2d 826, 827 (D.C. Cir. 1964).

[3] *Id.* at 829.

[4] *Id.* at 826.

[5] See Webel v. Yale University, 125 Conn. 515, 7 A.2d 215 (1939).

[6] 1 American Law of Property § 3.78, at 348-49 (Casner ed. 1952).

[7] D.C. Code Ann. § 1-226 (1961) authorizes the commissioners of the District of Columbia to make such reasonable police regulations as they deem necessary for the protection of the lives, limbs, health, comfort, and quiet of the people of the District. D.C. Code Ann. § 1-228 (1961) gives authorization for such building regula-

The District of Columbia Housing Code, section 2501, provides that housing accommodations shall be maintained and kept in good repair in order to keep the premises or neighborhood healthy and safe.[8] Section 2608 of the housing code provides that the owners of residential buildings shall place screens in windows during the summer months.[9] The decisions are in conflict with respect to whether or not a statute which provides that the owner must keep the building in repair imposes a liability in favor of a tenant or his privies, injured because of the owner's failure properly to maintain the premises. Some courts, in the absence of express statutory provision to the contrary, have held that a general legislative statement requiring the landlord to repair does not create such liability,[10] while a slight majority of courts allow recovery.[11] The District of Columbia court discussed this doctrine in *Whetzel v. Jess Fisher Management Co.*[12] The

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tions as are deemed advisable by the commissioners. Pursuant to this authority, the commissioners promulgated the Housing Code of the District of Columbia which contains the provision applicable to this case.

[8] D.C. Housing Code § 2501 (1951) provides:

> Every premises accommodating one or more inhabitants shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the code contemplates more than basic repairs and maintenance to keep out the elements; *its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.*

(Emphasis added.)

[9] D.C. Housing Code § 2608 (1951) provides:

> The owner or licensee of such residential building shall provide screens for all openings to the external air from March 15 through November 15 both dates inclusive. Such screens shall have a minimum of 16 meshes to the inch *and be so maintained as to prevent effectively the entrance of flies and mosquitoes into the building*; provided that effective means other than screens may be substituted therefor when specifically approved by the head of the Housing Division of the Department of Licenses and Inspection. All hinged screen doors shall open outwardly and shall be self-closing. Half screens may be used for double hung windows if they are so designed that they can readily serve either half of the window.

(Emphasis added.)

Taken alone this provision could not be a basis of liability because the language indicates that the purpose is to prevent the entrance of flies and mosquitoes, rather than for safety. In Gasquoine v. Bernstein, 10 Ill. App. 2d 423, 135 N.E.2d 121 (1956), the court denied relief under a similar ordinance because the meaning of an unambiguous statute could not be "restricted or enlarged." *Id.* at 427, 135 N.E.2d at 123.

[10] Johnson v. Carter, 218 Iowa 587, 255 N.W. 864 (1934); Tair v. Rock Inv. Co., 139 Ohio St. 629, 41 N.E.2d 867 (1942).

[11] See Morningstar v. Strich, 326 Mich. 541, 40 N.W.2d 719 (1950); Saracino v. Capital Properties Associates, Inc., 50 N.J. Super. 81, 141 A.2d 71 (App. Div. 1958).

[12] 282 F.2d 943 (D.C. Cir. 1960). The plaintiff sought to recover for injuries sustained when the entire bedroom ceiling fell upon her. Section 2504 was the specific code provision requiring interior walls and ceilings to be structurally sound. Section 2301 provides: "No owner, licensee, or other tenant shall occupy or permit the occupancy of any habitation in violation of these regulations."

court in *Whetzel* held that sections 2301 and 2501 impose a liability upon the landlord for personal injuries caused by the breach of his duty to keep the premises in good repair.[13] Assuming, on the authority of *Whetzel,* that the ordinance creates a general duty to repair the window screens, the duty must nevertheless be owed this particular plaintiff to justify recovery.[14]

The first sentence of section 2501 of the code provides that accommodations "shall be maintained and kept in repair so as to provide decent living accommodations *for the occupants.*" [15] Since plaintiff was an occupant of the premises, a fair reading of the ordinance would be that the defendant owed a duty to him. However, the plaintiff may not be the type of occupant to which the ordinance was directed. This is a matter of interpretation of the ordinance in the light of the evil which the legislature attempted to correct.[16] It would appear that the commissioners meant to protect people lawfully on the premises in the right of the tenant, but it is unlikely that a person on the premises in violation of a lease agreement was meant to be protected.

Another exception to the rule that a landlord is not liable for personal injuries incurred as a result of his failure to repair leased premises occurs where he covenants generally to make repairs. This exception is supported by a growing minority of jurisdictions[17] and by the *Restatement of Torts.*[18] The lease in the present case contained a covenant by the landlord to make all repairs except those necessitated by damage caused by the tenant.[19] However, a majority of authorities hold there is no liability even when there is such a covenant.[20] Various reasons have been given for denying relief. Some jurisdictions hold that tort liability cannot be based upon the lessor's breach of an agreement.[21] Many cases have denied relief for personal injuries based upon a contract because the injuries were not con-

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[13] *Id.* at 950.

[14] Prosser, Torts § 53, at 331 (3d ed. 1964).

[15] D.C. Housing Code § 2501 (1951). (Emphasis added.)

[16] See Prosser, *op. cit. supra* note 14, § 35.

[17] Waterbury v. Riss & Co., 169 Kan. 271, 219 P.2d 673 (1950). See Spencer v. Bartfield, 334 Mass. 667, 138 N.E.2d 129 (1956).

[18] Restatement, Torts § 357 (1934) states:

> A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sub-lessee by a condition of disrepair existing before or arising after the lessee has taken possession, if
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> (a) the lessor, as such, has agreed by a covenant in the lease or otherwise to keep the land in repair, and
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> (b) the disrepair creates an unreasonable risk to persons upon the land *which the performance of the lessor's agreement would have prevented.*

(Emphasis added.)

[19] Gould v. DeBeve, *supra* note 2, at 828 n.1.

[20] Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955); Bowman v. Goldsmith Bros. Co., 63 Ohio L. Abs. 428, 109 N.E.2d 556 (Ct. App. 1952); 1 American Law of Property § 3.79 (Casner ed. 1952).

[21] Jacobson v. Leaventhal, 128 Me. 424, 148 Atl. 281 (1930). See Denny v. Burbeck, 33 Mass. 310, 130 N.E.2d 542 (1955).

templated at the time the lease was executed.[22] A few states deny recovery because the lessor has relinquished control over the premises.[23] No District of Columbia case has been found specifically holding that a landlord is liable for personal injuries as a result of his breach of a covenant to repair and the court cites none. However, there have been many opinions which have assumed that such is the rule.[24]

Even if in the District of Columbia there is a duty of care on the part of a landlord who covenants to repair the premises, it does not necessarily follow that there is a duty to act for the benefit of the type of plaintiff involved in *DeBeve*. The court assumed the correctness of the characterization of the plaintiff as a trespasser, but it still held there was a duty not "wilfully or wantonly" to fail to repair.[25] This result could have been justified on the ground that the plaintiff was not a trespasser,[26] but the court did not attempt to do so.[27] The question of liability, therefore, does not seem to turn upon the distinctions of trespass. Rather it is a question of the fundamental fairness of holding the defendant liable to a person who was occupying the premises in violation of the lease agreement. It could be argued that this plaintiff is really no different from a social guest, and therefore the landlord's duty extends to him.[28] The language of the *Restatement of Torts* supports this view, stating that if the lessor covenants to keep the land in repair, he is liable to his "lessee or others upon the land with the consent of the lessee. . . ." [29] Is this plaintiff the ordinary guest? If the basis of the

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[22] Williams v. Fenster, 103 N.J.L. 566, 137 Atl. 406 (Sup. Ct. 1927); Jordan v. Miller, 179 N.C. 73, 101 S.E. 550 (1919). See Cooper v. Roose, 151 Ohio St. 310, 85 N.E.2d 545 (1955).

[23] Taylor v. Geroff, 347 Ill. App. 55, 106 N.E.2d 210 (1952).

[24] Harriston v. Washington Housing Corp., 45 A.2d 287, 288 (D.C. Munic. Ct. 1946) states *inter alia*: "*In the absence of express agreement by the landlord to repair,* or fraudulent misrepresentations as to the condition of premises, or deceit or concealment by landlord, tenant takes the risk of safe occupancy and takes the property as he finds it." (Emphasis added.) Other cases have assumed the same rule: Daly v. Toomy, 212 F. Supp. 475 (D.D.C. 1963); Fortner v. Moses, 49 A.2d 660 (D.C. Munic. Ct. 1946); Walker & Dunlop, Inc., v. Gladden, 47 A.2d 510 (D.C. Munic. Ct. App. 1946).

[25] Gould v. DeBeve, *supra* note 2, at 829.

[26] The action of trespass was designed to protect the interest of exclusive possession of land; therefore, a landlord cannot sue for a trespass when the land is in the possession of the tenant. Nor was the plaintiff a trespasser with respect to the tenant, Mrs. Dodd, since he was present with her permission. Prosser, *op. cit. supra* note 14, § 13.

[27] Gould v. DeBeve, *supra* note 2, at 829. "[P]rojecting the label . . . cannot rationally be an automatic determinant of the result in each case in which injuries attributable to the landlord have been sustained." *Ibid.*

[28] A minority of jurisdictions hold that where the landlord would be liable for personal injuries sustained by the tenant, he is also liable to members of the tenant's family, social guests, invitees, and others on the land in his right. Prosser, *op. cit. supra* note 14, § 63, at 422.

[29] Restatement, Torts § 357 (1934).

duty to the social guest is contractual,[30] and the social guest is not a party to that contract, then he recovers only because he is a third party beneficiary to the lease agreement. Although the courts and textwriters do not think of the problem in this manner when they impose liability on the landlord for the injuries of a person not a party to the lease agreement, they in effect imply that the person injured was meant to be benefited by the landlord's promise to repair. This implication seems valid, because it is normally contemplated at the time of the lease agreement that the tenant will have guests and invitees on the property. Following this line of reasoning, there would presumably be no reason why the parties could not agree that the benefit of the promise did not extend to a certain person. In order for the plaintiff to recover under the theory of third party beneficiary, he must prove that the promisee (lessee) intended to benefit the class of persons of which he is a member.[31] But here it seems extremely difficult to infer that Mrs. Dodd meant to benefit the plaintiff's class by obtaining the defendant's promise when in the same agreement she had promised to exclude all permanent occupants except herself and her family, and the plaintiff was a member of the excluded class. Therefore, taking the instrument as a whole into consideration, it seems very likely that there was no duty created toward this plaintiff by the lease agreement.[32]

In finding a duty in the instant case, the court did not seem greatly concerned with the fine points of the legal rules involved. Therefore it would be profitable to examine the policy issues which may have influenced the court's decision. Although the character of the neighborhood was not indicated, a significant number of rented dwellings are located in slum areas. In these areas the tenants are frequently not able to pay damages for injuries to third persons injured on the leasehold. Moreover, they are not likely to insure against liability; therefore, the ultimate risk of loss lies with the person injured. By comparison the landlord seems to be a better risk bearer. If he has more than one tenant, he can spread the risk of injury to all the tenants through increased rents. Likewise, the landlord would be more likely to insure against liability resulting from his failure to repair because he owns property which can be levied upon, and would frequently have more to lose by an adverse judgment than would the tenant. The cost of repairs and of insurance would be passed on to the tenants, who would, as a class, bear the ultimate risk of loss. It has been

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[30] Although the liability is in tort, the underlying duty arises out of the contractual relation. See Prosser, *op. cit. supra* note 14, § 63, at 422.

[31] There are two principal classes of beneficiaries who may enforce the contract, the creditor beneficiary and the donee beneficiary. The plaintiff is not a creditor beneficiary because the performance of the promise will not satisfy any duty owed to him by Mrs. Dodd. In order to be a donee beneficiary he must show that Mrs. Dodd procured the promise from the defendant with the intention of conferring a right on the beneficiary against the defendant. 2 Williston, Contracts § 356 (3d ed. 1959).

[32] A similar result could have been reached if the court had construed the defendant's promise to repair and Mrs. Dodd's promise to restrict permanent occupancy as mutually dependant promises. When Mrs. Dodd breached her promise, the defendant would no longer have had a duty to repair the premises.

argued that this added burden would cause rents to increase to such a level that many members of the working class would not be able to afford the cost of housing.[33] In answer to this, it has been said the landlord cannot charge more than the market will bear; thus some of the burden would rest upon the landlord.[34] This could, however, have the undesirable result of discouraging private investment and ownership in real estate.

The reason most often given for not imposing a duty on the landlord to repair is that he is not in control of the premises and is not in a position to observe the defects on the leasehold as they occur.[35] The tenant is in a better position to discover hazards and protect himself from them. If the landlord were required to repair, he would need power to inspect the premises periodically to avoid liability. Presumably rules would have to be formulated to preserve the tenants' privacy against continuing or unnecessary intrusions by the owner. The harshness of this policy as applied to landlords is ameliorated considerably by the widespread requirement that the lessee give notice of defects of which he has knowledge. The landlord thus notified must have failed to exercise reasonable care in order to incur liability.[36] Such notice was given the defendant in the instant case not once, but several times: this giving of notice to the landlord about known defects sweeps away the only serious objection to the raising of a statutory or contractual duty to repair.

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[33] Eldredge, "Landlord's Tort Liability for Disrepair," 84 U. Pa. L. Rev. 467, 490 (1936).

[34] Shulman & James, Torts 617 (2d ed. 1952).

[35] See 2 Harper & James, Torts § 27.16 (1956). However, this problem did not exist in the present case because the defendant was notified of the defect.

[36] Prosser, *op. cit. supra* note 14, § 63, at 423.